STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2003
v	No. 235634 Montcalm Circuit Court
MICHAEL LYNN GOODSELL, Defendant-Appellant.	LC No. 00-M-148-FH

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b. The trial court, applying a second-offense habitual offender enhancement under MCL 769.10, sentenced him to two concurrent terms of fifteen to thirty years' imprisonment. We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

The trial occurred on May 29 and 30, 2001. The prosecutor called the victim, Mary Ann Van Meter, as an adverse witness. Van Meter testified as follows: She did not want to testify in the case and had asked the court to drop the charges. She had been in continuous contact with defendant since his incarceration the previous June, and she and defendant had become engaged since his arrest. She met defendant in February 1999, and their relationship proceeded well until May 1999, when two men waved at her while she and defendant were camping. Defendant called her a "whore" after this incident because he thought she was flirting with the men, but Van Meter believed that by doing so defendant was merely "protecting his interest" in her. Defendant also became angry during the camping trip when Van Meter began preparing a salad that he had wanted to prepare.

Van Meter further testified that in June 1999, defendant became angry with her because she went shopping for a bathing suit, and "he didn't want me wasting my time on clothes." He ridiculed her body and became so angry that he drove off at a very high speed with Van Meter in his vehicle. Van Meter was frightened and wanted to return to her home, and defendant called her several abusive names and told her that she would go home "in a body bag." Another time in 1999, defendant threatened her during a trip to the point that she became nervous.

Van Meter further testified that in July 1999, she obtained a personal protection order (PPO) against defendant. In her petition for the PPO, she stated that defendant had choked her,

slapped her, and spit on her. Approximately seven days after obtaining the PPO, she wrote to the court to try and get it dismissed because defendant "promised to never do it again" and because she missed him. She admitted that defendant threatened to burn down her house if she did not get the PPO dismissed. She also admitted that defendant would sometimes beg for her affection on the telephone but "in the next breath or the next phone call" would threaten her with harm. On January 1, 2000, she telephoned the police because defendant told her that "he could kill me if he had to lose me."

A tape was played into the record. Although a transcript of the tape was not provided to this Court, it appears that the tape contained a message from defendant that was left on Van Meter's telephone answering machine. Van Meter admitted that on the tape, defendant stated that he wanted to harm the father of Van Meter's son. In another tape played for the jury but not transcribed for this Court, defendant threatened to stab Van Meter with a knife that she kept under her bed for protection.

Van Meter further testified that she ran a beauty salon out of her home and that defendant did not like her to have male clients. He accused Van Meter of having sex with the male clients. In June 2000, Van Meter was seeing defendant and was also seeing another man, William Christensen. Defendant left a message for her in which he "demand[ed]" that she be home around 10:30 p.m. on June 19, 2000, to receive a telephone call from him. She had spoken to him earlier in the day and told him that she could not promise to be home at that time, and in fact she came home around 1:30 a.m. She found that defendant had left another message for her indicating that he was trying to find her. She tried to reach defendant on the telephone but could not. Around 4:00 a.m., defendant woke her up by knocking on her bedroom window. He grabbed her by the arm, called her a slut, and asked her where she had been. They walked to the bedroom, and he pulled a knife out of his pocket.

Van Meter testified that defendant put the knife her neck, pulled her onto the bed by her hair, and told her that she could watch herself bleed to death. She thought that he was going to kill her. When she tried to get away, she cut her hand and began bleeding. Defendant spit on her and called her a "f---ing b---h."

Van Meter testified that she and defendant left the bedroom and had coffee and then came back into the bedroom, where he penetrated her orally and vaginally. She admitted that she initially did not tell the police that they had coffee before the penetrations. The prosecutor asked her if she performed oral sex on defendant out of fear, and she replied, "I was afraid of Mike, but we always did --" She then stated, "I wasn't afraid of Michael, we always did have a good sexual relationship." She then agreed that she did not dare say no to the vaginal penetration. She stated that she was still afraid of defendant when she awoke around 7:00 a.m.

During questioning by the defense attorney, Van Meter testified that she and defendant had sex almost every time they got together. About the night in question, she stated, "I was never afraid of sex, it was the knife I was afraid of, not the sex." She stated that she did not object to either instance of penetration and that she had sex with defendant again the morning afterwards. She stated that defendant never forced her to have sex and that she loves him and wants to marry him.

On further questioning by the prosecutor, Van Meter stated, "I was afraid, yes," when asked, "And you put his penis inside your mouth because you were afraid, isn't that correct?" She reiterated that she would not have dared to say "no" with the knife present. When the prosecutor asked whether she submitted to oral sex out of fear, she stated that she "was nervous" and that "I wasn't afraid of Mike, I was afraid of the knife." She stated, "At that point, yes," when the prosecutor said, "You were afraid to say no. Isn't that correct?"

Bernadine Lashar, the director of a domestic violence organization in Midland, was qualified as an expert in "the dynamics of domestic violence." Lashar testified that in abusive relationships, "cycles of violence" occur during which tension will build, the batterer will be abusive toward the victim, and then the batterer will act lovingly toward the victim and shower her with affection and gifts. Lashar testified that domestic violence victims often deny that the abuse occurred and return to the batterer.

William Christensen testified that he received a telephone call from Van Meter, whom he had been dating, on the morning of June 20, 2000. Christensen stated that Van Meter sounded very emotional, mentioned that defendant had been to see her, and asked if she could come by his house later to talk. Christensen testified that when he saw her later that day, she had a mark on her neck.

Frank Goodsell, defendant's twelve-year-old son, testified that on the night in question, he and defendant had ridden a motorcycle to get to Van Meter's house. He stated that he heard defendant and Van Meter yelling that night and remembered Van Meter yelling, "stop Mike."[1] Goodsell testified that defendant was angry with Van Meter and was swearing at her. Goodsell also testified that he saw Van Meter sitting on defendant's lap in the living room and that he saw them drinking coffee.

Trent Erskin testified that he met defendant in jail and that defendant threatened to blow up the Montcalm County courthouse and to kill the prosecutor and the judge. Erskin testified that defendant made these statements in front of numerous people during a counseling session.

Douglas Houser, a deputy with the Montcalm Sheriff's Department, testified as follows: He investigated a threatening telephone call complaint made by Van Meter around January 1, 2000. Van Meter seemed fearful of defendant, and he advised her to obtain a PPO against him. Around June 23, 2000, he investigated a complaint of criminal sexual conduct made by Van Meter. Van Meter told him that she "felt that [defendant] was going to force intercourse upon her . . . during [the] event." She also told him that she had intercourse with defendant because she was afraid. Houser interviewed defendant after his arrest, and defendant denied having a knife on the night in question and denied ever assaulting Van Meter.

Defendant presented no witnesses, and the jury returned a verdict of guilty on both counts of first-degree criminal sexual conduct.

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[1] It appears from the record that Goodsell was lying on a couch in the living room during the incident.

On appeal, defendant first argues that the trial court erred by allowing defendant to appear in leg irons before the jury. Defendant contends, among other things, that no steps were taken to hide the leg irons from the jury and that there was no "serious and sincere indication that [defendant] would try to injure anyone in the courtroom." We review a trial court's decision to permitting the shackling of a defendant for an abuse of discretion. See *People v Jankowski*, 130 Mich App 143, 147; 342 NW2d 911 (1983).

During jury voir dire, defense counsel stated, "What I am addressing is that I don't know why leg chains are on the defendant[.] When he came hobbling in here is the first that I knew that was going to happen. . . . I don't think that was fair to do that in front of the jury panel." The court stated, "with the information that he threatened both the Court and other people in this matter, the Court felt it appropriate that he have leg chains on." We cannot find that the trial court abused its discretion in permitting the use of the leg chains.

As noted in *People v Duplissey*, 380 Mich 100, 103-104; 155 NW2d 850 (1968), freedom from shackling during trial is an important right afforded to criminal defendants. Shackling should occur only to prevent escape, to prevent injury to others, or to maintain an orderly trial. *Id.* In this case, the lower court record contains a handwritten letter in which a jail inmate warned the court that defendant had threatened "on a couple sep[a]rate occasions" to "blow up" the judge and the prosecutor. The author of the letter indicated that he wrote the letter "to maybe prevent some serious harm." Under these circumstances, no error occurred with respect to the shackling of defendant. Indeed, evidence existed that defendant had threatened to harm individuals involved in the case, and the court thereby took precautions to prevent any injury. See *id*. Moreover, defendant failed to establish that prejudice resulted from his being brought into the courtroom in leg irons during jury voir dire. See *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980). Reversal is unwarranted.

Next, defendant argues that the prosecutor presented insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence, we "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.*; *Wolfe*, *supra* at 514-515.

Here, the prosecutor alleged that defendant violated MCL 750.520b(e) and (f). Under MCL 750.520b(e), a person commits CSC I if he engages in sexual penetration with another person while armed with a weapon. Under MCL 750.520b(f), a person commits CSC I if he engages in sexual penetration with another person using force or coercion and causes personal injury to the other person. "Force or coercion" includes a situation in which "the actor overcomes the victim through the actual application of physical force or physical violence" and a situation in which "the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats." MCL 750.520b(f)(i) and (ii). "Personal injury" is defined as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(l).

The prosecutor presented sufficient evidence for a reasonable trier of fact to determine that these elements were proven beyond a reasonable doubt. See *Hoffman, supra* at 111. Indeed, the fact that penetration occurred is not disputed. Moreover, Van Meter testified during trial that defendant had a knife during the night in question, that she was afraid of the knife, that she cut her hand on the knife and began bleeding, that defendant threatened to make her bleed, and that defendant pulled out some of her hair. Also, she stated, "I was afraid, yes," when the prosecutor asked her, "And you put his penis inside your mouth because you were afraid, isn't that correct?" She testified that she would not have dared to say "no" to defendant with the knife present, and she agreed that she did not dare refuse the vaginal penetration.

Additionally, Frank Goodsell testified that he heard Van Meter yelling "stop Mike" on the night in question, and Deputy Houser testified that Van Meter told him that she "felt that [defendant] was going to force intercourse upon her . . . during [the] event" and that she had intercourse with defendant because she was afraid. Moreover, although Van Meter testified at one point during the trial that defendant never forced her to have sex and that she loves defendant and wants to marry him, Bernadine Lasher indicated that domestic violence victims often deny that the abuse occurred and return to the batterer. In light of all the above testimony, the prosecutor presented sufficient evidence to support defendant's convictions, and reversal is thus unwarranted.

Next, defendant argues that the trial court erred by allowing the prosecutor to present "other acts" evidence under MRE 404(b). Specifically, defendant objects to the admission of evidence regarding his tumultuous relationship with Van Meter. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Watson,* 245 Mich App 572, 575; 629 NW2d 411 (2001). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id.*

In its written opinion allowing the evidence, the trial court stated, among other things, that "[p]rior acts between the Defendant and the victim are relevant to his intent, his state of mind, and to rebut the argument that the sexual penetration was consensual." The court further stated, "it is equitable to allow the Prosecutor to use this evidence, otherwise, there would be no evidence to refute that the Defendant and the victim had a loving caring relationship involving only consensual sexual activities." We cannot conclude that the trial court abused its discretion by allowing the evidence.

Under MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be used to prove something other than the defendant's propensity to commit a particular crime. MRE 404(b)(1); *Watson, supra* at 576. Some permissible uses are "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." MRE 404(b)(1). In *Watson,* this Court summarized the factors a court must consider when analyzing evidence under MRE 404(b):

> First, the prosecutor must offer the other acts evidence for a permissible purpose, i.e., to show something other than the defendant's propensity to commit the charged crime. [*People v VanderVliet,* 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).] Second, the evidence must be relevant to an

> issue or fact of consequence at trial. *Id*. Third, the trial court must determine whether the evidence is inadmissible under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra* at 74-75. Additionally, the trial court, on request, may instruct the jury on the limited use of the evidence. *Id*. at 75. [*Watson, supra* at 577.]

The trial court's decision to admit the evidence in question did not violate the rules established by the above authorities. Indeed, the prosecutor properly offered the evidence to demonstrate defendant's state of mind and to establish a background for the testimony of Bernadine Lashar. The evidence clearly was relevant to an issue of consequence at trial, because it tended to show that defendant attempted to control and intimidate Van Meter during the course of the relationship. This made more likely the prosecutor's theory that the sexual penetrations at issue had been nonconsensual and that Van Meter was a reluctant witness because of the peculiar dynamics of abusive domestic relationships. Moreover, the probative value of the evidence was very high, given that, as noted by the trial court, it "help[ed] . . . the jury to understand domestic violence and the mechanics of the 'battered woman syndrome.'" See *People v Daoust*, 228 Mich App 1, 10-11; 577 NW2d 179 (1998) (discussing relevance of "battered woman syndrome" evidence). The danger of unfair prejudice did not substantially outweigh the probative value of the evidence, and no error requiring reversal occurred.

Defendant also argues that the trial court erroneously admitted Trent Erskin's testimony regarding defendant's threats against the judge and the prosecutor. The trial court allowed the evidence because "it would go to show conscious[ness] of guilt in this matter." We agree. As noted in *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996):

> [A] threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case.

While *Sholl* involved a threat by the defendant against the complaining witness and not against the prosecutor and the trial judge, we nonetheless find the *Sholl* Court's reasoning equally applicable to the circumstances in the instant case. The trial court did not abuse its discretion by admitting the testimony.

Defendant raises several more issues in a supplemental brief. He first contends that the trial court erred by allowing Bernadine Lashar's testimony. We disagree. As stated in *People v Christel*, 449 Mich 578, 579-580; 537 NW2d 194 (1995):

> [E]xpert testimony regarding the battered woman syndrome is admissible only when it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified.
>
> Generally, battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of

> physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse.

Here, the testimony was highly relevant and helpful to the jury because it helped to explain why Van Meter would remain in a relationship and in fact become engaged to a man who had sexually assaulted her. Moreover, contrary to defendant's contention, the court properly concluded that Lasher was qualified to offer expert testimony with regard to the battered woman syndrome. Lasher testified that (1) she was the executive director of a domestic violence agency and had been for nine years, (2) she had a college degree in Sociology and another degree in Counseling, (3) she did research on "why someone stays in an abusive relationship," (4) she belonged to several professional organizations dealing with domestic violence, and (5) she had been qualified as an expert witness "regarding the dynamics of a domestic violence relationship" approximately eight or nine times in the past. Under these circumstances, no error occurred with respect to the trial court's ruling.[2] Reversal is unwarranted.

Next, defendant argues that the trial court erred by allowing certain portions of William Christensen's testimony. Specifically, defendant contends that Christensen's testimony regarding the content of his telephone call with Van Meter on the day after the sexual penetrations constituted inadmissible hearsay. However, even assuming that a hearsay violation occurred, we conclude that Christensen's testimony that Van Meter called him and asked if she could come by his house later to talk simply did not affect the outcome of the trial under the harmless-error standard from *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant also contends that the trial court should not have allowed Christiansen to testify that Van Meter told him that defendant had threatened to kill her and her mother and son. Once again, however, even assuming that a hearsay violation occurred, we conclude that the evidence did not affect the outcome of the case, given that (1) the court specifically limited the jury's use of the testimony, stating that "[t]his was just to explain why she was upset and you cannot use that testimony to determine whether or not these things were done in June;"[3] and (2) Van Meter had already testified about defendant's threats to kill her, burn down her house, and harm the father of her son. Under these circumstances, it does not affirmatively appear to us that "it is more probable than not that [any possible] error was outcome determinative" *Id*.

Next, defendant argues that the trial court asked prejudicial and misleading questions during jury voir dire that served to improperly influence the jury. Defendant particularly objects to the question, "Do all of you agree that if a man uses force or coercion, such as putting a knife to the head of his girlfriend, that it is still a sexual assault, even if his girlfriend might have consented without it?" We decline to address this issue because it was not raised in the statement of questions presented for appeal. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (2000). However, even if we *were* to address the issue, we would find no error

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[2] Contrary to defendant's argument, the fact that Lashar stated that she did not "necessarily agree with everything" said by an author of book on the battered woman syndrome did not render Lashar unqualified to testify as an expert witness in this case. We further reject defendant's implied argument that an expert witness must possess a doctorate degree.

[3] We note that jurors are presumed to follow the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

requiring reversal. Indeed, the questions to which defendant objects were tailored to discover whether any jurors had preconceived notions about whether a person could be punished for a forcible sexual assault upon a former consensual lover. The questions did not remove the presumption of innocence, and the trial court reiterated in its jury instructions that defendant was presumed to be innocent.

Next, defendant argues that the prosecutor committed several instances of misconduct requiring reversal. Defendant contends that the prosecutor "badgered, intimidated, confused, and manipulated his own witness [Van Meter] . . . into saying what he wanted her to say" and that the prosecutor "improperly used the victim's badgered, intimidated, confused, and manipulated words in his closing arguments to establish the elements of the crimes charged . . . ." We disagree.

We review claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We examine the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *Id*. Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, if a defendant did not object to the alleged prosecutorial misconduct below, we review for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the case. *Id.; People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763; *Schutte*, *supra* at 720. Moreover, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

Here, defendant did not claim below that the prosecutor "badgered, intimidated, confused, and manipulated" Van Meter. Nor did defendant object to the prosecutor's closing argument. Accordingly, we will review this issue for plain error. We discern no plain error. Indeed, the record does not support defendant's allegations of harassment, and under MRE 611(c)(3), the prosecutor was allowed to ask leading questions of Van Meter because she was a "witness identified with an adverse party." Moreover, the prosecutor in his closing argument merely commented on the evidence introduced at trial.

Defendant additionally contends that the prosecutor argued facts not in evidence by stating in closing arguments that Van Meter "never said that she consented to those acts. . . . she never said, I freely and voluntarily consented to those acts." Defendant contends that these statements by the prosecutor were erroneous because Van Meter testified that she did not object to either instance of penetration and that defendant never forced sex on her. As noted in *People v Viaene*, 119 Mich App 690, 696-697; 326 NW2d 607 (1982), a "prosecutor may not make a statement of fact unsupported by the evidence. . . ." However, in context, see *McElhaney, supra* at 283, the prosecutor's argument in this case was proper. Indeed, the prosecutor was merely

emphasizing that Van Meter never explicitly stated that she consented to the penetrations. No clear or obvious error occurred.[4] *Carines, supra* at 763.

Defendant additionally contends that the prosecutor erred by playing the admitted audiotapes during closing arguments and by stating:

> Think about the context of the past. Think about the context of the demeaning her family. Think about the context of demeaning her. Think about the context of the lies that you've heard. . . . When you think about the past relationship, think about the demeaning nature of the language he uses. Think of the emotional manipulation that he's used. Think about whether Mary pushed him that half inch. Think about how much he loved her and how much she consented. Think about how he behaved. . . .
>
> When you think about consent and the evidence of the past relationship, remember he's on his way down and convict him of CSC in the first on two counts.

We discern no clear or obvious error with regard to the prosecutor's statements or with regard to the playing of the audiotapes. Indeed, the prosecutor was simply using and properly commenting on evidence properly admitted in the case. Moreover, even if an error *had* occurred, we would conclude that it did not affect the outcome of the case. Accordingly, reversal is unwarranted. *Id.*

Defendant additionally argues that prosecutor erred by mentioning during closing arguments that the trial court had asked the jurors during voir dire whether "sexual assault remains a crime, even if the person would have consented without say force or coercion, would have consented without the knife, and even though they consented in the past?" Once again, we find no plain error requiring reversal under *Carines*. The prosecutor's comments were proper and did not likely affect the outcome of the case.[5]

Finally, defendant claims that his convictions must be reversed because of cumulative error. "This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial." *People v Knapp,* 244 Mich App 361, 387; 624 NW2d 227. "[T]he effect

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[4] We note that defendant emphasizes in his supplemental brief that Van Meter "repeatedly said she was afraid of the knife, not Defendant," but it is unclear to which part of the prosecutor's closing argument defendant is directing this statement. At any rate, we discern no error with regard to the prosecutor's statements in closing arguments regarding Mary's fear. Obviously the knife itself would not incite fear if not wielded by someone.

[5] We note that the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and that "you should decide this case from the evidence." These instructions lessened any prejudice resulting from the prosecutor's statements in this case. See *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Moreover, any prejudicial effect of the prosecutor's comments also could have been cured by a contemporaneous objection and curative instruction. *Schutte, supra* at 721

of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id.* at 388. We find no such prejudice.

Affirmed.

/s/ Daniel S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter